

No. 12,544

IN THE

United States Court of Appeals
For the Ninth Circuit

MATANUSKA VALLEY FARMERS COOPERATING
ASSOCIATION (a corporation),

Appellant,

vs.

C. R. MONAGHAN,

Appellee.

SUPPLEMENTAL BRIEF ON PETITION FOR A REHEARING.

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ALLOCATION OF PROFITS.

An attempt was made by the witness, Snodgrass, ex-manager of the Cooperative, to explain the system of distribution of Association profits after the end of each fiscal year. He advanced the theory that after determining the net profits of the Association for a given year these profits were returned to those producers who are shown by the books to have earned them.

The brief of appellant adopted this theory of distribution and called it "Allocation of Profits".

The Appellate Court seems to have gone along with this theory of distribution, for it states on page 5 of its opinion:

operative has distributed in addition the net profits of the entire Cooperative. The figures do not support that statement, and we respectfully assert that the court is mistaken.

In 1943 the net profits of the entire Cooperative were, as shown above, the sum of \$65,252.42. In addition to the flat, irrevocable payments, the Cooperative paid to producers of milk, cream, eggs, and meat additional payments to the amount of \$47,516.19. (Defendant's Ex. I, pages 3-4.) The balance was retained by the Cooperative, presumably as the Creamery share of the profits of the Creamery-Dairy, and the Meat Department share of any profits made from the resale of meat purchased from the farmers, which would be a small amount.

In 1944 the net profits of the entire Cooperative were, as shown above, the sum of \$61,580.27. In addition to the flat irrevocable payments the Cooperative paid to milk and egg producers additional payments to the amount of \$47,528.40 (Plaintiff's Ex. 6, page 3) of which \$45,919.20 was paid to milk producers and \$1609.20 to egg producers. (Plaintiff's Ex. 6, page 16.)

The balance was retained by the Cooperative as the Creamery share of the Creamery-Dairy profits. It amounted according to Plaintiff's Ex. 6, page 3, to \$18,943.42.

These balances retained by the Cooperative out of the 1943 and 1944 were not distributed to anyone. The \$18,943.42, as the court will remember, was strenuously contended by the witnesses Snodgrass and

Allyn, to be the part of the profit earned by the Creamery in 1944.

Now when the dairymen were made these additional payments in 1944 and 1945, they accepted them as being the profits, made on the resale of their milk, in accordance with the contract. The payments were made in instalments. In 1945 they received one payment of \$22,563.31, made shortly after the audit, and one of \$23,355.89, made later in the year. Their individual remittance slips, which are in evidence, show that these payments were designated, "Second Payment on Milk Pool" and "Final Payment on Milk Pool". This shows conclusively that they were being paid according to paragraphs (6) and (7) of the marketing contract, because no other paragraphs contemplate a pool. The first payments were the "flat, irrevocable payments, paid bi-weekly, and which aggregated \$136,143.47. That is to all the dairymen.

Now we have shown that the dairymen were at no time paid the net profits of the entire Cooperative as additional payments. They were paid what they had a right to assume was their profits on the resale of their milk, after the deductions, established by the Association as proper deductions, and specified in the marketing contract, had been made. They had nothing to gain, but much to lose, by consenting to a modification of the contract, which could at no time increase their profits, but could, and did, according to the Appellate Court's decision, greatly reduce them.

The five, which are called "consumer's departments", could not share in profits, nor could the

Creamery branch of the Creamery-Dairy department share in profits. If they made profits they were retained by the Cooperative as Cooperative profits. They could not be paid to the producer. All that could be paid to the producer was the profit made on the resale of his milk, under the contract, and it was at no time paid to the producer as an allocation of profits of the Association, to "those Producers who were deemed to have earned them".

When the Cooperative paid the dairymen additional payments for the milk sold the previous year, they said, in effect to the dairymen, "here are your profits on the resale of your milk." The remittance slips in evidence said that. They said that in 1945, when the Cooperative paid them \$45,919.20, and retained \$18,943.42 as Creamery earnings. They said that in 1944, when the Cooperative paid the producers of milk, cream, eggs and meat, the sum of \$47,516.19 and retained about \$18,000.00 as Creamery profits. The Cooperative paid, or pretended to pay to the dairymen, not on allocation of net profits of the Association, but what was owing to the dairymen for their milk under the contract.

The court says on page 6 of its opinion, "No attempt has been made to return to the individual producer the proceeds from the resale of his produce." We believe that the evidence shows that for every year's operations since the Association went into the business of buying and selling fluid milk, the Cooperative has assumed to pay the producer the profits made on the resale of his milk, under the terms of the original contract.

ADVANCES.

We concede that the down payments made to the dairymen on delivery of his milk were not advances in the strict sense of paragraph (4) of the contract. Under that paragraph the Association was not obligated to make any advances. They did make down payments, after delivery, and after they had marketed the milk and were perfectly safe in so doing. Down payments were not inconsistent with the terms of the contract. These payments, were not carried on the books as advances, but, as this court says on page 5 of the opinion, as "cost of goods sold". They were not deducted from the proceeds of the resale, as "repayment of advances made to producer under paragraph 4 of this contract and interest on said advances" as provided in paragraph 7(a), but were credited to the Association and charged to the producer, as "cost of goods sold".

No interest was chargeable, as the milk was sold before the producer was paid. In this connection we ask the court to read the testimony of Snodgrass, commencing with the last question on page 513 of the record, and ending on page 515.

For the additional reasons herein set forth the appellant renews his request for a rehearing of this cause.

Dated, Anchorage, Alaska,
May 31, 1951.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Petitioner.